(10)

No. 89-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,

Petitioner,

—v.—

STATE BAR OF NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF NEVADA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEVADA, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan membership corporation with over 275,000 members, dedicated to defending the principles of individual liberty embodied in the Constitution. The ACLU of Nevada is one of its statewide affiliates. Throughout its seventy-year history, the ACLU has been particularly associated with free speech issues and has participated in thousands of cases involving the First Amendment at every level of the state and federal courts. In addition, it has been cognizant that the litigation in which it has been involved often serves as a catalyst for political change and therefore takes on First Amendment significance. Because this case seems to restrict the ability of lawyers to comment on their pending cases and therefore restricts the First Amendment rights of the lawyers, their clients, and public interest organizations that may employ them, the ACLU is presenting its views through this *amicus* brief.

People for the American Way (PFAW) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAW now has over 290,000 members nationwide. PFAW and associated attorneys have been involved in litigation across the country seeking to defend these values, in which the public voices of the attorneys involved have been crucial in helping educate the wider public on important civic and constitutional issues. PFAW files this brief because of the potential significance of this case to these important First Amendment rights.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici adopt the Statement of Facts as set forth by petitioner.

SUMMARY OF ARGUMENT

The Nevada Supreme Court Rule under which Mr. Gentile was sanctioned is unconstitutional on overbreadth grounds. Public statements by lawyers about public interest cases, which make up a large part of the docket of both state and federal courts, involve matters of public concern within the meaning of this Court's precedents. The Nevada Rule on its face sanctions all public comments by lawyers in all cases, both civil and criminal. Although a narrowly tailored rule might be formulated that would cover comments by lawyers in criminal cases dealing with specific items of evidence, the rule in this case is substantially overbroad in its application to constitutionally protected speech.

Even if the rule were not invalidated on overbreadth grounds, the only time a lawyer can be sanctioned for public comments about a pending case is when his comments actually prejudiced the proceedings; that is, if his statements led to a mistrial or other disruption of a pending matter. Lawyers are not part of a regulated industry in which they give up their First Amendment rights in exchange for the privilege of practicing law.

Finally, the sanction imposed below cannot be upheld because a criminal defense lawyer must have a "right of reply" to public statements surrounding the indictment of his client. Prosecutors often hold press conferences or issue statements about an indictment which frequently create an unfavorable atmosphere concerning the guilt or innocence of a client. A defense lawyer must have the opportunity to respond to such comments in the interest of fair play and due process.

ARGUMENT

I. NEVADA SUPREME COURT RULE 177 UNDER WHICH PETITIONER WAS SANCTIONED SHOULD BE INVALIDATED UNDER THE OVERBREADTH DOCTRINE

A. Lawyers' Speech About Pending Public Interest Cases Is Protected By The First Amendment

This Court does not sit as the final disciplinary body for lawyers admitted in the states who may be sanctioned by their highest state courts. As Justice Brennan explained in *Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring): "This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics."

However, this Court does have the final say over what the First Amendment means. Thus, if state disciplinary rules are applied against a lawyer for exercising his or her rights under the First Amendment, this Court can, and often has, struck down the discipline imposed, or the rule applied, on First Amendment grounds. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (state disciplinary rule prohibiting lawyer from soliciting business by sending truthful and nondeceptive letters to potential clients unconstitutional under First and Fourteenth Amendments); *In re R.M.J.*, 455 U.S. 191 (1982) (application of state disciplinary rule against lawyer sending out mailed announcement cards invalid under First Amendment); *In re Primus*, 436 U.S. 412 (1978) (state disciplinary rule against solicitation of clients cannot be applied to ACLU attorney contacting client and offering free legal services for purpose of commencing litigation and advancing civil liberties objectives of ACLU).

Although many of this Court's recent decisions on the subject of attorney discipline deal with the question of a lawyer's commercial free speech rights, this Court has always recognized the close relationship between litigation and the political free speech rights of litigants and their lawyers. The *Primus* case is illustrative. In that case a local ACLU lawyer, Mrs. Edna Smith Primus, contacted a woman, Mrs. Marietta Williams, who had attended a meeting where the lawyer had discussed the legal problems of sterilization and offered to represent sterilized women in suits against the performing doctors. After being advised that Mrs. Williams, one of the women who attended the meeting, was considering such a suit, Mrs. Primus wrote a letter offering her services and those of the ACLU free of charge for bringing such an action. Mrs. Williams then showed the letter to her doctor, who referred the matter to the state grievance committee. The Committee instituted disciplinary proceedings against Mrs. Primus and found her guilty of solicitation under local ethics rules.

This Court reversed. Relying on its earlier decision in *NAACP v. Button*, 371 U.S. 415 (1963), this Court held that the activities of Mrs. Primus in contacting a potential client were protected by the First Amendment. The Court also distinguished *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where direct person-to-person solicitation for pecuniary gain was involved:

> [A]ppellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery.

> And her actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU, rather than to derive personal gain.

436 U.S. at 422.

Similarly, in *Button* itself, this Court reversed a state court decision finding that the efforts of the NAACP to explain their litigation objectives to potential clients in an effort to advance those objectives by finding prospective plaintiffs could not be sanctioned under the state bar's antisolicitation rules. The Court emphasized that the attempt by the NAACP to advance its civil rights agenda through litigation was protected under the First Amendment: ". . . the activities of the NAACP, its affiliates and legal staff . . . are modes of expression and association protected by the First Amendment." 371 U.S. at 428-29.

See also United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971)(efforts by labor unions to provide low-cost, effective legal representation to their members protected by the First Amendment right of association and cannot be sanctioned under state ethics regulations); *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964)(union program of recommending competent attorneys for injured members protected by First Amendment and cannot be sanctioned by state bar); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967)(hiring attorney on salary basis to represent workers in workers compensation cases protected by First Amendment and cannot be sanctioned by state bar).

If contacting clients and bringing cases to advance the civil liberties agenda of the organizations involved is core political speech, fully protected by the First Amendment, then the act of a civil liberties lawyer in publicly discussing these types of cases is also core political

speech and is also fully protected by the First Amendment. Suppose Mrs. Primus had in fact brought an action on behalf of Mrs. Williams to sue for damages because of her sterilization. Suppose she held a press conference announcing the suit and stating that the efforts of state authorities to sterilize poor women on welfare was a violation of their constitutional right of privacy. Such a public statement to explain the basis and purpose of the suit surely serves an important public policy objective. It may educate the public on how poor women can be improperly pressured to give up their vital reproductive rights, how they can defend themselves legally, and why sterilization is not an appropriate solution to women on welfare.

This Court can take judicial notice of the fact that civil liberties and public interest organizations of every type who file *pro bono* litigation frequently announce the purpose of their suits in press conferences, in order to explain their objectives to others in society who may then coordinate those legal efforts with political actions seeking to advance the same objectives.[2] Public comments by lawyers about their pending public interest cases must therefore be held to be core political speech.

[2] A cursory computer check on NEXIS shows that there were at least 275 newsstories from 1989 to the present involving comments to the press by lawyers. These included comments by lawyers on many significant cases involving the public interest. *See, e.g.* Washington Post, August 1, 1990 (story on obscenity trial of 2 Live Crew); San Francisco Chronicle, September 21, 1990 (story on consumer suit brought against insurance companies); Los Angeles Times, September 21, 1990 (story on new surrogate mother case).

B. Since Nevada Supreme Court Rule 177 Could Cover Protected Political Comment By Lawyers In Public Interest Litigation, It Must Be Declared Invalid Under The Overbreadth Doctrine

As obvious as the proposition advanced in the prior section may be, it has crucial significance in this case. The Nevada Supreme Court Rule at issue here is not limited to public comment by a lawyer in pending criminal proceedings involving only his client and the evidence in the case. It covers comments by all lawyers in all proceedings. Rule 177 reads in part:

> 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:
>
> a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.
>
> • • • •
>
> d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;
>
> 3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litiga-

tion of a matter may state without elaboration:

a. the general nature of the claim and defense;

b. the information contained in a public record;

c. that the investigation of the matter is in progress . . . .

A number of comments are necessary about the Rule:

1. On its face, the operative language in ¶1 applies to all litigation, both civil and criminal. Paragraph 2 is simply a special definitional section dealing with specific comments in a criminal proceeding. If ¶1 is found invalid, then the other operative sections dependent on it must also fall.

2. Because ¶1 covers all litigation, it presumptively includes public interest litigation such as that described in the *Primus* and *NAACP v. Button* cases, which are fully protected by the First Amendment as core political action. Thus, in the hypothetical given above, if Mrs. Primus described what evidence she proposed to offer in the case (including such matters as expert testimony that would tend to show how poor women on welfare are exploited and pressured to give up their rights), she presumably could run afoul of the rule.[3] Likewise, if the

[3] We put aside the vagueness problem in determining what type of public comment by a lawyer in a civil case "will have a substantial likelihood of materially prejudicing an adjudicative procedure." Among the definitional problems that have to be faced are the questions whether the standard is different if the case is tried to a court rather than a jury; how does an ethics committee determine whether prejudice could occur if no trial is ever held; is the "substantial likelihood" standard equivalent to a "clear and present danger test" or a "serious (continued...)

NAACP lawyers in the *Button* case brought an action to invalidate the Virginia laws on segregation and discussed specific evidence they proposed to introduce in such a case, presumably they could also have been sanctioned under a rule similar to that in force in Nevada.

3. Criminal actions may also implicate core First Amendment activities. To cite just a few recent examples, the public was extremely interested in obscenity charges brought against the rap group "2 Live Crew" in Florida last summer because of the sale of one of their albums. Similar charges of obscenity were filed against the museum director of the Cincinnati Contemporary Art Center, Dennis Barrie, for displaying photographs by Robert Mapplethorpe in his museum. The charges implicated serious public interest matters about the scope of the obscenity laws, the range of popular culture, and the nature of photographic art. The lawyers involved in these types of cases could and should feel free to contribute to the public discussion of those issues.[4]

4. As discussed below in Point III, a prosecutor is free under the rule to say whatever he wants in a press conference about the indictment which he prepared (since that is "information in a public record" which is excluded from the rule's coverage by ¶3(b)). But a lawyer responding to a prosecutor's public comments on the indictment would be guilty of violating the rule if he

[3] (...continued)
and imminent threat" test or is there a difference between them. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

[4] As noted below, the comments made by Mr. Gentile and for which he was sanctioned involved accusations of criminal behavior against a police officer, which by definition involved a matter of public concern within the meaning of this Court's precedents. *See Connick v. Myers*, 461 U.S. 138 (1983); *see also Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990)(any statement about wrongdoing or breach of public trust by public employee was matter of public concern).

maintained his client's innocence.

Thus, the potential exists for Nevada Rule 177, which is based on ABA Model Rule of Professional Conduct 3.6, to be used to sanction core political expression; *i.e.*, public comments by public interest lawyers about litigation implicating and advancing the "civil liberties objectives" of their organizations. Even if it were possible to draft a specific, narrow rule to cover public comments by criminal defense lawyers about the evidence in a case, the application of the type of broad rule at issue in this case, that could cover such an important and wide-ranging amount of protected speech, runs afoul of the overbreadth doctrine.

This Court explained in *Gooding v. Wilson*, 405 U.S. 518 (1972):

> It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute .... [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" .... This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Id. at 520-21 (citations omitted).

It is true that the overbreadth doctrine applies only if the overbreadth aspects covering speech are "substantial," *New York v. Ferber*, 458 U.S. 747, 769 (1982), and that the doctrine does not apply in the commercial free

speech area, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. at 478. But neither of those limitations apply here. The overbreadth of Nevada Rule 177 is clearly substantial, since public interest litigation and cases raising issues of "public concern" are an enormous part of the docket in both the state and federal courts.[5] Comments by lawyers about these cases cannot be considered insignificant. Furthermore, as this Court's decision in *Primus* makes clear, these cases do not invoke the right of commercial free speech but rather involve core political expression.

Nevada Rule 177 must therefore be invalidated on overbreadth grounds.

II. LAWYERS' SPEECH ABOUT PENDING LITIGATION IS PROTECTED BY THE FIRST AMENDMENT AND CANNOT BE SANCTIONED UNLESS A COURT FINDS THROUGH CLEAR AND CONVINCING EVIDENCE THAT THE COMMENTS DID IN FACT PREJUDICE THE PROCEEDINGS

Even if the overbreadth doctrine was not applied to strike down Nevada Rule 177 in its entirety, the rule cannot be interpreted as broadly as the lower court did in this case. Its only legitimate application must be in cases where a court found that an adjudicative proceeding was in fact undermined by a lawyer's out-of-court prejudicial comment. That is, if a mistrial were in fact declared or a proceeding overturned because of something a lawyer said that violated a properly drafted rule,

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[5] As an illustration, according to the 1989 Annual Report of the Administrative Office of the United States Courts, the largest category of civil litigation in the federal courts is in the civil rights field (other than actions for recovery of overpayments and enforcement of judgments). *See* Table C2, Table of Civil Cases, Commenced by Basis of Jurisdiction and Nature of Suit.

then and only then could any sanction be applied.

At the outset we must take issue with the position outlined in the Solicitor General's *amicus* brief on the Petition for *Certiorari*. The Solicitor General suggests that lawyers are part of a regulated industry that does not enjoy the same rights as the rest of American society. "A lawyer has a professional obligation not to make comments that appear reasonably likely to endanger the fairness of his client's trial. *A lawyer is not in the same position as [a] private citizen with respect to the judicial system.*" Brief for the United States as *Amicus Curiae* at 5-6 (emphasis added).

> According to the Solicitor General, the state may extract a renunciation of First Amendment rights from a lawyer as a condition of giving him a license to practice law:
>
> > By virtue of the status conferred on him by the State, a lawyer often enjoys special access to information about a case . . . . The State . . . can lawfully condition the lawyer's right to practice law on his exercise of responsible restraint in using the information that comes to him by dint of his state-conferred license.

Id. at 7. Both of these points are demonstrably wrong and require response.

In the first place, the legal profession is not a regulated industry in the same sense as the liquor or gun industry. Lawyers are private entrepreneurs who serve a vital public function, often by contending against the very state that licensed them. As this Court observed in *Cammer v. United States*, 350 U.S. 399, 405 (1956):

> It has been stated many times that lawyers are "officers of the court" . . . . [But] nothing that was said in *Ex parte Garland* or in any

> other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.

In view of the fact that public interest litigation is often a necessary catalyst for, and instrument of, political activity (as explained above), the lawyer engaged in that litigation should have more, rather than less, scope for expressing himself in public. The idea that the person with the greatest knowledge of the subject at hand, which is often the people's business in the highest sense, should be least able to discuss it goes against every principle of the First Amendment. One purpose of the First Amendment is to arrive at the truth through the free marketplace of ideas. *E.g., Abrams v. United States*, 250 U.S. 616 (1919). It follows that any restraint on the expression of that information by persons most knowledgeable can only be justified by an extremely important governmental counterinterest. (We discuss below the circumstances when an actual subversion of the legal process by a lawyer can justify sanctions.) But to say that the granting of a license to practice law alone justifies such restraint is unsupportable.

There is another reason why the Solicitor's position cannot be sustained. This Court has established that the state cannot impose "unconstitutional conditions" upon the grant of any benefit. *See Western and Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 657 (1981)("this Court has . . . held that a State may not impose unconstitutional conditions on the grant of a privilege"). The basis for that rule was explained in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. For if the government could deny the benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

See also Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare payments cannot be conditioned on waiver of right to travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Speiser v. Randall*, 357 U.S. 513 (1958)(tax exemption), or *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971)(bar admission).

The state may no more condition the grant of the license to practice law on the demand that a lawyer not join a political party or go to church than it can on the demand that he give up his right to free speech.

What follows from this discussion is that the only circumstances under which a lawyer can be sanctioned for public comment about a matter in which he appears is when he violates a direct order not to comment on a case or reveal specific information, or when his comments do in fact subvert the process; *i.e.*, a mistrial is declared, a jury cannot be convened because of prejudicial publicity generated by the lawyer, or a case is overturned on appeal because of such comment. Such a rule is necessary as a corollary to the recognition that lawyers play a vital First Amendment role in this society and that their knowledge of a case is often crucial to understanding the public policy implications of the matter. That knowledge should be shared with others who may wish to act on the matter in the political sphere.

Weighed against that right is the state's interest in the fair administration of justice. But only when the state's interest is actually undermined can sanctions be imposed. That rule has the virtue of adequate definition and easy application. The current rule requiring that a "lawyer . . . reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" contains distorted syntax, hypothetical conditions and imprecise predictions.

The Solicitor General attacks the "actual prejudice" principle on the ground that it would undermine the possibility of disciplining an "unethical" lawyer if a proceeding were "fortuitous[ly]" aborted; *i.e.*, for reasons not related to the lawyer's conduct. "Under such a regime, the deterrent impact and uniform application of disciplinary rules regulating extrajudicial comments would be seriously undermined." Brief of the Solicitor General at 12. But the government's position begs the question. The argument reduces itself to the claim that ethics committees should be free to discipline a lawyer for making public comments because they want to make it easy to impose such sanctions without the need for showing prejudice. It simply states the result without giving any reasons for it. By contrast, an actual prejudice rule would achieve clarity and uniformity without undermining the important First Amendment values implicated by any direct ban on lawyers' speech.

III. A CRIMINAL LAWYER SHOULD BE ALLOWED A RIGHT TO REPLY TO PUBLIC COMMENTS BY A PROSECUTOR ABOUT AN INDICTMENT

Even if the Nevada Rule were not invalidated on overbreadth grounds and even if the rule could be applied without a showing of actual prejudice, there is something totally unfair and improper about the manner in which it is applied in this type of case.

Mr. Gentile was disciplined for making public comments about the innocence of his client one day after enormous publicity had been generated by the prosecutors' office through the arraignment of his client for larceny and narcotics possession.

As noted above, under the applicable rules (Nevada Rule 177, ¶3(b)), prosecutors are allowed to make public comments to the press about "the information contained in a public record." Since an indictment is a "public record," prosecutors may read every word of the indictment -- which they drafted -- to the press without worrying about the application of the disciplinary rules.

In fact, it is a regular practice for prosecutors, both state and federal, to hold elaborate press conferences to announce an indictment, particularly of public officials, such as that involved in this case. A brief computer survey through NEXIS shows that there were 92 news-stories in the past two years containing the words "prosecutor," "press conference," and "indictment." Included are the following:

> Chicago Tribune, December 20, 1990; report on indictment of political figures in Chicago; "'Whatever type of corruption you wanted, you could get,' U.S. Att'y Fred Foreman said in announcing Wednesday's indictments. 'And this movable feast went from the 1st Ward to Springfield, to City Hall, to the Circuit Court of Cook County (and) the highest levels of the Chancery Court.'"

> Washington Times, January 19, 1990; "U.S. Attorney Jay B. Stephens . . . said in a press conference immediately after the arraignment of D.C. Mayor Marion Barry on a drug possession charge that it was a 'personal tragedy for the defendant in this case, but the narcotics abuse is also a personal tragedy for many in this city.'"

> Los Angeles Times, April 22, 1989; report on indictment of prominent businessman for narcotics possession; "Immediately after the arraignment, prosecutors called a press conference to release the indictment . . . U.S. Attorney William Braniff said the case illustrates the growing role people with power and status in the financial community are playing in the world of narcotics trafficking. 'I believe the indictment points out the potential danger that exists when members of society with influence in financial affairs offer their services, in this case to the underworld, for any illicit purposes they want,' Braniff said."

The Attorney General of the United States is a frequent participant in press conferences or press statements that report on indictments of federal offenders. For example:

> Los Angeles Times, October 26, 1990; report of indictment of former S&L owner; "The indictment was announced at a press conference here by Att'y Gen. Dick Thornburgh and Marvin Collins, the U.S. Attorney in Dallas. Western Savings was seized by federal regulators in September, 1986, and

> Thornburgh said its losses are expected to cost taxpayers in excess of $1 billion. Thornburgh called Woods 'one of the biggest savings and loan bandits in Texas.'"
>
> Newsday, July 26, 1990; report on indictment of Eastern Airlines for failure to maintain proper safety records. "In a statement released by his office in Washington, U.S. Attorney General Dick Thornburgh said the alleged conspiracy 'strikes a raw nerve in anyone who has ever boarded an airplane.'"

To say to this Court that a defense lawyer violates the lawyer disciplinary rules when he responds to the massive publicity surrounding an indictment of a public official or a public figure -- which the prosecutors are free to read to the last word -- defies every principle of fair play.

In numerous areas of the law, a person is privileged to respond to accusations or comments made by others even though he or she might be sanctioned for making the comment without such a provocation. *See, e.g., United States v. Young*, 470 U.S. 1, 11 (1985)(discussing right of response by prosecutor to improper argument made by defense counsel); *Lawn v. United States*, 355 U.S. 339, 359-60 (1958)(discussing "invited reply" doctrine in criminal trial); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)(discussing fairness doctrine and personal attack under FCC rules); *Buckley v. Vidal*, 327 F.Supp. 1051 (S.D.N.Y. 1971)(discussing qualified privilege and self-defense doctrine in libel law).

Whatever might be the proper scope for gag rules on lawyers relating to a pending case, the rule must take into account the need to respond to the massive publicity surrounding an indictment of a public official or prominent individual, which is totally under the control of prosecutors. As explained above, prosecutors can and

do hold press conferences which explain the indictment and often go beyond the four corners of the instrument. There must at the least be a qualified privilege for defense attorneys to respond to such publicity.

In this case, it is undisputed that Mr. Gentile's comments were made in response to the publicity surrounding the arrest and arraignment of his client. Subsequent events, including the acquittal of his client, supported the accuracy of what he said. Sanctions were totally inappropriate under the circumstances.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

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